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February 7, 2000 FEB - 7 2000

VIA HAND DELIVERY

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

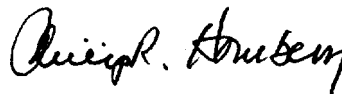
**Re: Comments of the National Hockey League
 in CS Docket No. 00-2**

Dear Ms. Salas:

Enclosed for filing please find the original and nine (9) copies of the Comments of the National Hockey League in the above-referenced docket.

Please stamp and return to this office with the courier the enclosed extra copy of this filing designated for that purpose. Please direct any questions that you may have to the undersigned.

Respectfully submitted,



Philip R. Hochberg

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEB - 7 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Matter of:

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Implementation of the Satellite Home
Viewer Improvement Act of 1999

CS Docket No. 00-2

Sports Blackout Issues

COMMENTS OF
NATIONAL HOCKEY LEAGUE

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February 7, 2000

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EXECUTIVE SUMMARY

The National Hockey League ("NHL" or "League") files Comments before the Commission in the general implementation of Section 339(b)(1)(A) and (b)(1)(B) of the recently-enacted Satellite Home Viewer Improvement Act.

The NHL initially points out that the concept of sports blackouts is one that has been repeatedly approved by Congress, going back nearly forty years. Starting in 1975, the Commission adopted sports blackout rules for cable television, which have been in effect for a quarter century. Sports leagues, including the NHL, have continued to protect the economic viability of the home gate, through the use of blackouts, during this entire period.

The Commission, charged with implementing Section 339 of the SHVIA, has raised some twenty-one issues -- some major, some minor -- that deal with blackouts in the Notice of Proposed Rulemaking. The League responds to them on a question-by-question basis. Some points, however, recur throughout the Comments:

- (i) Parity is required in the Commission's treatment of cable and satellite. The rules that are applicable to the former should be translated to the latter, including making all distant signals subject to sports blackouts.
- (ii) The Commission should apply sports blackout rules to all distant stations which might be carried by satellite: network affiliates, nationally distributed superstations (both network affiliates and the one independent), and any additional independents that might be satellite-delivered in the future.
- (iii) Satellite services and satellite subscribers should be held to the sports blackout rules. The rule should apply to grandfathered and unserved subscribers. The only "small system exemption" should be for satellite services whose total numbers of subscribers is less than 1,000. The burden should be on systems and subscribers to show that the sports blackout rules do not apply to them.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Matter of:)	
)	
Implementation of the Satellite Home)	CS Docket No. 00-2
Viewer Improvement Act of 1999)	
)	
Sports Blackout Issues)	

COMMENTS OF
NATIONAL HOCKEY LEAGUE

The National Hockey League ("NHL" or sometimes "the League") hereby files the enclosed Comments before the Federal Communications Commission in response to the Notice of Proposed Rulemaking ("Notice"), issued on January 7, 2000 in CS Docket No. 00-2,¹ dealing with, among other subjects, blackouts of over-the-air sports programming delivered by satellite carriers to residential subscribers,² as a result of the passage of the Satellite Home Viewer Improvement Act ("SHVIA").³

¹ FCC 00-4, 65 Fed. Reg. 4927 (February 2, 2000).

² See specifically, Notice at Paras. 24-29 and 33, and generally in Paras. 9-12, 30-31, and 34-37. The Notice also deals in part with the adoption of network nonduplication and syndicated exclusivity rules.

³ Enacted, November 29, 1999, as part of Pub. L. No. 106-113, 113 Stat. 1501, and codified in various sections of Titles 17 and 47 of the United States Code.

As the Commission recognizes in the Notice, SHVIA has added new Section 339 to the Communications Act, which is the subject of this proceeding.⁴ Section 339(b)(1)(A) adds sports blackout protection dealing with “the signals of nationally distributed superstations” while Section 339(b)(1)(B) adds sports blackout protecting dealing with “signals of network stations.”

The Leagues urge that this Rulemaking create a regulatory framework mirroring the acceptable framework of cable regulation. No distinction should be made in terms of the home gate blackout between cable and satellite and certainly no distinction should be made among the different types of stations which may be carried by satellite.⁵

BACKGROUND

Congressional Sanctioning of Sports Blackouts

Critical to any examination of Section 339 is the recognition and acceptance of the rights of a sports team not to be forced to compete against itself, facing the unfair competition and untoward result of allowing a telecast from a distant market to be used against the local team.

On four different occasions now – 1961, 1973, 1996, and 1999 – Congress has approved the position of professional sports in protecting its home gate against the same (or competing) games being offered in the home market against the will of the home team. The Commission should note the consistent Congressional policy.

⁴ Importantly, the legislation also made changes in Section 119 and added Section 122 to the Copyright Act.

⁵ The Notice identifies the various kinds of stations cited in the statute: network stations, nationally distributed superstations/network affiliates, and the one nationally distributed superstation/independent. At the same time, however, the Commission should apply any rules adopted to potential new superstations (independents not affiliated with any network which might be carried on satellite in the future; sometimes referred to as “new superstations”). See *infra* at text accompanying Notes 28-29.

In 1961, Congress passed the Sports Broadcasting Act,⁶ which allowed professional football, baseball, basketball and hockey leagues to pool the television rights of their member clubs and sell those rights as a single package. At the same time, however, the law codified the decision of Judge Allan Grim, who, eight years earlier, had held that the National Football League was justified in protecting the home gate by not allowing other telecasts to be shown in the home market when the local team was playing at home.⁷ (By virtue of the pooling provision of Section 1 of the Sports Broadcasting Act, Congress also legislatively reversed Judge Grim's holding that the NFL could not protect against other games coming in when the local team was playing away.)

In 1973, Congress limited the scope of the home game blackout in the Sports Antiblackout Law.⁸ Congress, in narrowly-drafted legislation which expired 24 years ago, held that national network telecasts, entered into under the Sports Broadcasting Act of 1961, had to be offered for local telecasting if the game was sold out 72 hours in advance. Given its narrow scope, however, the legislation specifically did not affect (a) non-sold out games or (b) telecasts pursuant to local contracts. In so doing, Congress once again approved the general concept of home gate protection against the same game or competing game telecasts.

⁶ Pub. L. 87-331, 75 Stat. 732 (1961), as amended by Pub. L. 89-800, 80 Stat. 1515 (1966) and codified at 15 U.S.C. §§1291-93.

⁷ United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953) and 196 F. Supp. 445 (E.D. Pa. 1961).

⁸ Pub. L. 93-107, __ Stat. __ (1973), codified at 47 U.S.C. §332 (expired December 31, 1975).

The Commission's regulations protecting the home gate were legislatively approved four years ago in the Telecommunications Act of 1996,⁹ which allowed telephone companies to provide video programming directly to subscribers in their telephone service areas, subject to local blackout protection.

Finally, in November of 1999, Congress, in passing the Satellite Home Viewer Improvement Act,¹⁰ again approved home game blackouts. The recently-passed legislation sanctioned existing FCC regulations and approved limitations on satellite importation of distant signals carrying a telecast of a team's home game.

It is against this background that the Commission has opened the current rulemaking proceeding.

Adoption by the Commission of the Sports Blackout Rule

The Notice recognizes that protection of the home gate against the importation of distant signals on a non-consensual basis goes back more than a quarter-century to the consideration of cable television blackouts in 1975.¹¹ The Commission cited Congressional concerns in sports broadcasting legislation passed in 1961¹² and 1973,¹³ which recognized the importance of protecting the home gate of sports events.

⁹ Pub. L. 104-104, 110 Stat. 56 (1996).

¹⁰ Supra note 3.

¹¹ See, e.g., Comments of National Hockey League in Docket No. 19417, March 16, 1972.

¹² Supra note 5.

¹³ Supra note 7.

In the Sports Blackout proceeding in 1975 – as in this proceeding, as well – the Commission appreciated that sports programming offered unique considerations. Various teams in the NHL not only provide substantial local programming of their games (usually away games), but make conscious decisions not to televise home games on over-the-air stations. These teams then would be uniquely vulnerable to the importation of distant signals: Not only would the importation of those distant signals imperil the critical home gate, but could have an effect on local telecasting packages.

In extending the sports blackout rules to Open Video Systems in 1996, the Commission agreed with the uniqueness of the sports rule:

We find merit in [the Joint Sports Petitioners] position that, unlike network non-duplication and syndicated exclusivity, sports exclusivity requires infrequent deletions that cannot be recouped once missed. We believe that our rule that extends the Commission's regulations concerning sports exclusivity to open video systems must be amended in order to preserve the same level of protection received by sports teams and leagues in the cable context.¹⁴

The Commission stated in the current Notice that Section 76.67, the cable blackout provision, was adopted in 1975

based on a concern that sports teams would refuse to sell [sic] the rights to their local games to television stations serving distant markets due to their fear of losing gate receipts if the local cable system imported the local sporting event carried on the distant station. The Commission stated this would have the ultimate undesirable effect of making sporting events available to fewer viewers.¹⁵

¹⁴ Third Report and Order and Second Order on Reconsideration in In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46, __ FCCRcd __, __, 4 CR 380, 428-29 (1996).

¹⁵ Notice at Para. 24, citing Report and Order in In re Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs, Docket No. 19417 ("Sports Blackout Report and Order"), at 54 FCC2d 265, 281, 34 RR2d 683, 703 (1975).

What the Commission said a quarter-century ago about cable is still pertinent today -- with cable and with satellite distribution -- in dealing with network stations, nationally distributed superstations, and potentially new superstations:

In the case of cable television importations of blacked out home games, the ultimate effect of frustrating local blackouts might be to reduce overall sports telecasts ... [which could] force sports clubs to extend their blacked out zone of protection to include all distant stations which may be carried by local cable television systems. Thus, the games would be available to fewer television viewers, contrary to our communications policy and the sports broadcasting policy of Congress.¹⁶

As a result of Congressional directives and with a certain element of fairness involved, the Commission adopted Section 76.67 in 1975, which required, generally, that cable systems within the specified zone of television stations licensed to cities where games were taking place could not import a distant telecast of the home game if that game was not being shown, over-the-air, at its site. With few changes and with few challenges, the rule has remained in effect for twenty-five years.

League and Team Use of Blackouts

For decades, the League has used the protection afforded by Section 76.67 of the Commission's rules. Notices are sent to all cable, MMDS, SMATV, and Open Video System

In fact, however, the Notice misstated the general concern. The greater problem of the NHL, for example, in dealing with a typical game (e.g., Boston Bruins at New York Rangers) is not that the home team Rangers might sell their home game to a station in Boston, but that the visiting team Bruins are allowed to televise over WSBK-TV, Boston, pursuant to intraleague arrangements. If the Rangers cannot get protection against a Bruins/WSBK-TV telecast coming into the New York area on cable or satellite, the Rangers may choose to deny the Bruins the opportunity to telecast out of Madison Square Garden. Such a decision would protect the Rangers home gate, but would prevent Bruins fans in Boston -- or anywhere else where the signal of WSBK-TV is viewed on cable or by satellite -- from seeing the game.

¹⁶ Sports Blackout Report and Order at 282, 34 RR2d at 704.

operators at the beginning of the season, supplemented by notification for changes in regular season telecasts and the post-season schedule, covering all games televised by the visiting team out of the home arenas (assuming the games are not shown live on over-the-air television facilities in the home market). The protection given runs to any importation of distant signals which might carry those games.

In the case of national telecasts, the League – consistent with the spirit of the expired Public Law 93-107 – has agreed in recent years to lift home game blackouts on national network telecasts. This comes as a result of arm's-length negotiations with the networks and is an integral part of the network package. Any benefits and any detriments are spread over the entire league as a result of the pooling permitted by the Sports Broadcasting Act.¹⁷ However, the League controls which games may be shown and where.

From the standpoint of local telecasts, all U.S. teams in the NHL now have cable contracts. In large measure as a result of changes in the television industry, a number of teams now rely on cable for their local distribution. (In addition, some teams have reversed their long-standing practice against showing home games on over-the-air television.¹⁸)

However, in the circumstances where the Leagues maintain control and are not subject to compulsory license importation of telecasts, a home game blackout remains in effect. So, in the NHL's distribution of Center Ice – a satellite and cable package of games usually distributed on

¹⁷ Supra Note 6.

¹⁸ See, e.g., the Detroit Red Wings, which now televise forty per cent of its home games over-the-air. This however is a market-by-market, team-by-team decision which can change. For example, for many years, the Boston Bruins televised a heavy home schedule over-the-air, but no longer do.

Regional Sports Networks – the League does not allow distribution within the home territory of the game site. For example, a Washington subscriber to Center Ice on March 3 would not be able to access the Fox Sports Net origination of the blacked out Red Wings at Capitals game, on the Center Ice package. Apart from compulsory license situations, if the League can control the distribution, it does.

DISCUSSION OF ISSUES

In its Notice, the Commission has identified numerous issues, which will have effects, major and minor, on the League. The League treats those issues seriatim:

- (a) Are foreign stations affected by the provisions of the Satellite Act?¹⁹

The Commission says:

We...note that the statutory definitions of network station, television network, and television broadcast station generally contemplate entities within the United States....Are stations based in foreign countries affected by the SHVIA provisions requiring application of the...sports blackout rules to satellite retransmissions?

The question raised by the Commission appears ambiguous: (a) Can foreign stations be carried and, if so, where and what program exclusivity provisions – including sports blackouts – are applicable or (b) do Canadian sports teams have the right to assert the program exclusivity provisions – including sports blackouts – against U.S. subscribers?²⁰

The initial question exists as to whether Canadian stations can even be carried as distant signals by U.S. carriers, given the language of Section 119 of the Copyright Act. New Section 122 specifically allows Canadian stations to be offered as local signals, but Section 119 is silent

¹⁹ Para. 6.

²⁰ Indeed a third question exists: Are there the legal grounds to assert sports blackouts against U.S. viewers of Canadian satellites?

(except in that it references the definitions of Section 111). Section 111 defines “superstations” and “network stations” in terms of U.S. licensing or operational functions and also allows, but specifically limits, where foreign stations may be transmitted.²¹ Given the specific language of Section 111 and the absence of such language from Section 119, the League believes that there is a substantial question as to whether Congress intended to allow Canadian signals to be used as distant signals by U.S. satellite carriers.

Since carriage of any stations must comport with FCC regulations and carriage of foreign stations by cable systems is subject to the scope of Section 76.67, without equivocation, delivery of foreign stations by satellite carriers, even if permissible, must be subject to any satellite sports deletion rule.

While this is particularly important to the NHL, with six Canadian teams, sports blackouts would not be especially burdensome to satellite carriers, given the number of U.S. franchises currently within the protected zone.²² In the NHL, only four current franchises fit the criteria: Boston, Buffalo, Detroit, and Pittsburgh.²³

²¹ Section 111 of the Copyright Act allows the carriage of Canadian signals only by cable systems north of the 42nd Parallel or less than 150 miles from the Canadian border.

²² Since signals could not be offered outside of the area where cable systems can carry Canadian signals, supra Note 21, the Commission need be concerned only with franchises within that geographic zone.

²³ The new Minnesota and Columbus NHL franchises, which would be covered, will begin play in the 2000-2001 season.

Given that the Commission should apply its sports blackout rules evenly against any station carried by satellite,²⁴ no question should arise regarding which kind of station is being offered.

In dealing with the alternative question – the rights of Canadian sports teams to assert the sports blackout provisions – any lack of rights of Canadian television stations to assert network nonduplication or syndicated exclusivity is of no moment. The League’s franchises in Canada should be allowed to assert Section 76.67-type protection against U.S. satellite subscribers in the same fashion as U.S. teams.

- (b) Given the background of the legislation, is it proper to assume that Congress was trying to create parity between cable and satellite in superstation program deletion?²⁵

The Leagues concur in the Commission’s analysis that Section 339(b)(1)(A) was designed to create parity between cable and satellite in the carriage of nationally distributed superstations. While Congress even chose not to require retransmission consent for the six nationally distributed superstations involved,²⁶ at the same time, Congress specifically directed the Commission to adopt the very program exclusivity rules – including sports blackout – for satellite as for cable. The Commission simply has no leeway in dealing with the nationally distributed superstations.

With regard to potentially new superstations – independents which might be uplinked in the future – the Commission should take the logical step of mandating that any satellite-

²⁴ See discussion infra at text accompanying Notes 28-29.

²⁵ Para. 9.

²⁶ As the Commission notes, the number of nationally distributed superstations cannot exceed the six stations identified, since no other station can meet the statutory criteria to become a nationally distributed superstation.

distributed station is subject to the sports blackout rules. It would not be at all consistent to exempt these potentially new superstations, creating a possible loophole in the protection required by Congress.²⁷

- (c) Are the cable rules broader than the scope of Section 339(b)(1)(B) in that that subsection applies only to network stations?²⁸

The Commission apparently raises this question since the text of Section 339(b)(1)(B) directs the FCC “to apply sports blackout protection (47 C.F.R. 76.67) to...network stations....” At the same time, however, Section 76.67 applies not just to network stations, but to all stations. The NHL does not believe that Congress was attempting to create any unique direction in dealing with network stations. For purposes of legislative drafting, all of the nationally distributed superstation provisions dealing with program exclusivity were subsequently placed in one subsection.

However, in “seek[ing] comment on whether the cable rules are indeed broader in scope than Section 339(b)(1)(B),” the Commission should note that the cable rules in fact are broader in scope than Section 339(b)(1)(B) or (b)(1)(A). As the League has stated, those sections cover network stations and nationally distributed superstations only; they do not cover any additional stations which are not affiliated with any of the six networks – remaining “true” independents – and do not fall into the statutorily-limited category of nationally distributed superstations. That Congress did not direct the Commission to adopt sports blackout provisions dealing with these

²⁷ See infra at text accompanying Notes 28-29.

²⁸ Para. 10.

other stations in no way precludes the Commission from doing so. Indeed, logical consistency requires it.

The intent of Congress was to square as nearly as possible the cable and satellite rules, in the same way that Open Video Systems were to be treated like cable. It would be unfair, for example, if cable systems had to blackout KCAL-TV, Los Angeles, the flagship of the Mighty Ducks of Anaheim, but a satellite distributor did not.

In terms of sheer numbers, for the NHL, the absence of this protection could create problems, since nearly a third (4 of 13) of NHL U.S. flagships are independent stations.²⁹

It remains to be seen how the satellite industry will develop in its use of over-the-air signals. But the Commission should not allow a potential loophole to exist. Simply enough, whatever rules have existed for cable's carriage of any broadcast station should be applicable to satellite's carriage of any broadcast station. In the same way that the Commission had the general regulatory authority to adopt Section 76.67 for cable in 1975, it has the general regulatory authority to adopt comprehensive home gate blackout for satellite twenty-five years later.

(d) Since the title of Section 339 talks in terms of "distant stations," but the text does not, what did Congress intend when faced with two affiliates of the same network within one market?³⁰

The issue here appears to be that a station may be a local station (since it is within the DMA and technically within the market), but may be a distant station in terms of television

²⁹ The converse of this critical point in see infra at text accompanying Notes 42-43.

³⁰ Para. 11.

program sales. The concern (raised here as well as in Para. 29) does not appear to be an issue for the NHL.³¹

- (e) Should the amended provisions be incorporated into existing rules (e.g., §76.67) or should new rules be adopted?³²

Although the League recognizes that any regulations adopted likely will be in a separate section of the rules, it supports associating the regulations with Section 76.67, as was done in dealing with Open Video Systems.³³

- (f) Definition of “network program.”³⁴

The Commission recognizes that technology has by-passed its regulations. It states that under Section 76.5(m), a network program is defined as

“any program delivered simultaneously to more than one broadcast station regional or national, commercial or noncommercial.”...It is not necessary that the program be delivered by a “television network.”

In fact, programs generally considered in the industry to be syndicated shows, such as “Entertainment Tonight” or “Access Hollywood” would be network programs under the FCC’s definition.

Any programs carried on a national network station are subject to the provisions of Section 339(b)(1)(B). Just as the League pointed out that a large percentage of its flagships are

³¹ Given the significantly different broadcasting pattern of the National Football League, the issue of multiple affiliates of one network in a single market could present a sports-related problem.

³² Para. 12

³³ See Section 76.1506(m) of the Commission’s Rules.

³⁴ Notice at Footnote 28.

independent stations (which should be subject to Section 76.67-type regulation³⁵), an even greater percentage are affiliates of the two new networks, UPN and WB. Among the NHL's U.S. flagships, more than two-thirds (9 of 13³⁶) are UPN and WB stations. Protection under subsection (B) is warranted, since they are network stations, and is imperative.

(g) Should the notification period be the same for cable and satellite?³⁷

The League believes the notification period should be the same for both delivery systems. Over the past twenty-five years, procedures have been developed which have proven efficient for all parties. Under Section 76.67(c), notice is required to be received no later than the Monday preceding the calendar week in which the deletion is to be made. In fact, the League willingly provides season-long regular season notices prior to the beginning of the season.

The Commission's reference to the fact that sports notices "can be as little as 24 hours in contrast to 60 days for the other rules" may be accurate, but is misleading. When there is a change in television schedules, a rescheduled game, or the beginning of post-season playoffs, the burden is on the sports entity to provide notice within 24 hours of the time the change in schedules is made, but, in any case, no less than 24 hours before the deletion must be made. Twenty-five years worth of experience has shown this to be an acceptable burden on both parties.³⁸

³⁵ See supra at text accompanying Notes 28-29.

³⁶ One of the UPN affiliates is WSBK-TV, Boston, which, as a nationally distributed superstation, is also subject to Section 339(b)(1)(A).

³⁷ Para. 24.

³⁸ The League has "gone the extra mile of cooperation" with numerous cable operators. For example, in the case of AT&T Broadband, in addition to the actual written notices, the

(h) Should there be an exemption akin to the “cable system” 1,000 subscriber exemption?³⁹

The Commission poses the question as to whether there will be satellite situations comparable to the blackout rule which “does not apply to cable systems with fewer than 1,000 subscribers.” The situations, however, are neither analogous nor comparable. First, a cable system with 1,000 subscribers is truly a small system, generating perhaps \$250,000 per year from an off-air tier.⁴⁰ Second, even with 1,000 subscribers, not all of them necessarily receive the signal to be blacked out; a system with 1,000 subscribers might be blacking out only a portion of those subs. Third, it is not inconceivable that a satellite carrier could deliberately keep affected subscribers below the 1,000 mark to avoid compliance with blackout rules. Fourth, the Commission calls for cost information from the satellite carriers on blacking out less than 1,000 subscribers in a particular area. This kind of cost information -- ostensibly necessary for comparison with cable -- is meaningless, since the cable rules never considered costs-per-subscriber-to-be-blackout. Instead, the proper comparison is for the Commission to be looking at equipment costs on a system-wide basis for the entire satellite operation. Finally, to analogize the financial situation of DirecTV, with eight million subscribers, or EchoStar, with 3.4 million subscribers,⁴¹ to small cable operators strains credibility.

League provides discs covering all of the systems. In the case of MediaOne, the League for years has provided specialized notices to specific personnel.

³⁹ Para. 25.

⁴⁰ This Mom-and-Pop type operation, while huge in numbers (59% of all systems), represents less than three percent of cable subscribers. Cable Television Developments, Winter, 1999, National Cable Television Association, at 11.

⁴¹ See SkyREPORT, January 7, 2000 and January 6, 2000.

- (i) Since network signals can only be delivered to “unserved households” and there will be few unserved households within the “existing sports blackout zone,” aren’t the “technical and economic challenges” too burdensome for the number of blackouts?⁴²

Four critical points must be seen. First, the Commission must recognize that setting up a deletion procedure to take care of the nationally distributed superstations melds with whatever procedures might be necessary to take care of network blackouts. Congress has directed the Commission to adopt rules dealing with blackouts of nationally distributed superstations. As long as a single nationally distributed superstation -- all of which carry sports programming -- is carried, the satellite carriers will have to provide for sports blackouts. Second, the application to network stations applies not only to national network programming, but to any local programming carried on network affiliates. For the NHL, this is critical, since 9 of the 13 NHL U.S. flagships are network affiliates. Third, although the Commission relegates it to a footnote,⁴³ the FCC “acknowledge[s] that ‘some’[sic] served households” can get distant signals. Indeed, there are more than 1.5 million subscribers that are grandfathered in terms of C-band and Grade B subscribers. Finally, it is not known how many subscribers within the heart of a market will be able to make the case that they in fact are unserved. The fact that they might not have been able to receive a local over-the-air signal does not entitle them to receive games which were never shown locally. Even if those subscribers were served, they would not have seen the blacked out game. Whatever rights these subscribers might have vis-a-vis reception of television signals does not run to sports telecasts not shown locally.

⁴² Para. 26.

⁴³ See Notice at Footnote 65.

- (j) Under what circumstances should network station sports blackouts apply to satellite, is the 35 mile zone appropriate, and what “technical and economic consequences” are related to compliance by satellite?⁴⁴

While the sports interests cannot speak about the “technical and economic consequences” required by the legislation – at least until the Reply Comments – it is worth noting here the requirement by Congress in the Joint Explanatory Statement:

These [new network station blackout] regulations under subparagraph (B) are to be imposed “to the extent technically feasible and not economically prohibitive” with respect to the affected parties. The burden of showing that conforming to rules similar to cable would be “economically prohibitive” is a heavy one. It would entail a very serious economic threat to the health of the carrier. Without that showing, the rules should be as similar as possible to that applicable to cable service.⁴⁵

This carriers must meet this burden, showing not just that it would be inconvenient or difficult or costly, but that it could put them out of business.

The circumstances triggering network sports blackouts should be the same as with non-network stations: any time a game is televised by a distant station, the rules should prohibit the satellite importation of that distant station if the game is not also televised over-the-air locally. With the adoption of a blanket rule, the Commission will not be forced into making any qualitative judgments as to how many subscribers must be affected, whether some signals should be treated differently than others, etc. As the League has stated, the satellite blackout should be applicable to any station, in the very same fashion that the blackout is applied to cable systems.⁴⁶

⁴⁴ Para. 27

⁴⁵ (Emphasis added.) Joint Explanatory Statement at 145 Cong. Rec. at H11796 (November 9, 1999).

⁴⁶ See supra at text accompanying Notes 28-29.

- (k) What are the technical and economic considerations of using “conditional access” in the blackout situation?⁴⁷

The Commission’s inquiry seems to beg the question. It says: “[W]e ask whether conditional access mechanisms can be used to blackout sports programming on network stations.” However, if a blackout mechanism must be found for sports blackouts on nationally distributed superstations (by the requirements of Section 339(b)(1)(A)), then it follows, perforce, that a sports blackout mechanism can be found for network stations.

If the technology exists for allowing virtually instantaneous access to a movie ordered on a particular night, that same technology should permit subscribers to be denied a sports-carrying signal on a particular night. No one is saying that it will not involve some specific skills to develop such a program, but that is the burden that carriers must accept in order to carry the signals otherwise.

- (l) How should the rules treat the unusual problem of two-affiliates-in-a-market?⁴⁸

See comments associated with (d) above.

- (m) Should the “community unit” standard apply to satellite regulation? Should there be a specific identification of each subscriber’s location?⁴⁹

As suggested by the Commission, the use of the cable-based “community unit” has no real application to satellite. The origin of its use in cable was that systems were created on a franchise

⁴⁷ Para. 28.

⁴⁸ Para. 29.

⁴⁹ Para. 30.

basis and each “community unit” was capable of franchising. As the FCC points out, that is simply not pertinent to satellite.

Indeed, as the Commission suggests, it is better to identify the specific location of the served household vis-a-vis the zone of protection. This should start out with the use of zip codes. Any subscriber inside a zip code within the protected zone should be considered subject to the sports blackout rules. If in fact the subscriber’s address is within a zip code partially-in-and-partially-out of the protected zone, that subscriber can seek a waiver of the rules, in the same way that a subscriber will do when he claims he does not get acceptable service, although within the Grade B contour. Indeed, a waiver claim based on mileage can be resolved within minutes by plotting the location on maps.

The FCC’s concern about subscribers who use post office boxes or rural route numbers seems misplaced. Despite their mailing address, every dish has a physical location which can be identified and plotted to determine if they are within or without the protected area.

(n) How does the use of the DMA in the bill affect determination of the specified zone?⁵⁰

The use of the DMA may in fact have some implication in network non-duplication and syndicated exclusivity – which look to a specified zone tied to television station location – but would appear to have no implications to sports blackouts where the protected zone is predicated on the city with which the team is identified and a particular Reference Point in that city.⁵¹

The Commission should, however, reiterate its willingness to consider waivers to the use of downtown reference points in the case of suburban sports facilities. In the Reconsideration of

⁵⁰ Para. 30.

⁵¹ See 47 C.F.R. 76.53.

the adoption of Section 76.67, the Commission noted the unique problem of facilities not located near the reference point in Section 76.53. The Commission said:

Where this standard [the use of television station specified zones] is clearly not appropriate, we will look favorably upon waiver requests seeking to substitute a zone of protection extending from the site of a sports event for the television station specified zone designated by the rule.⁵²

- (o) Are there special rules that apply to programs which may be substituted when there are blackouts?⁵³

With regard to sports blackouts, satellite carriers can carry whatever stations and programs they would otherwise be entitled to, subject of course to the blackout. So, as the Commission notes, if a program on a station generally could be carried without retransmission consent (e.g., nationally distributed superstations), then it can be carried as substitute/fill-in programming without retransmission consent. On the other hand, if retransmission consent would be required to carry the station and program generally, then it must be obtained for the substitute programming.

The FCC should also note the provision, however, of new Section 339(a)(1)(a) which specifically states that satellite carriers

shall be permitted to provide the signals of no more than 2 network stations in a single day for each television network.

If the substituted program is to come from a third station, it is impermissible.

⁵² Reconsideration of Report and Order in Docket No. 19417, __ FCC2d __, __, 35 RR2d 807, 814 (1975).

⁵³ Para. 31.

- (p) Does retransmission consent protect the use of programming from a “new” superstation?⁵⁴

The Commission says:

We believe that the statutory requirements...will protect all contractual arrangements because the satellite carrier either needs the retransmission consent of the independent station or voluntarily complies with the exclusivity and sports blackout rules.

The statement by the Commission seems to imply that a satellite carrier has the right to use programming from a new superstation if it “voluntarily complies with the exclusivity and sports blackout rules,” even if it does not have transmission consent. In fact, the NHL believes that consent is needed.

The Commission, in the past,⁵⁵ has refused to take an unequivocal stand on the scope of retransmission consent with regard to copyright holders. But the FCC in fact should take the opportunity to recognize retransmission rights of copyright owners as an integral part of the broadcast industry.

- (q) What are the implications of the Satellite Home Viewer Improvement Act to various sports broadcasting packages?⁵⁶

While the Commission’s Notice focuses on the programming of the National Football League, other leagues have similar, although not as extensive, network packages and similar concerns. In the case of the NFL, it apparently has questions about a satellite carrier creating a

⁵⁴ Para. 32.

⁵⁵ Report and Order in In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCCRcd 2965, 3004-05 (1993).

⁵⁶ Para. 33.

package competitive to its Sunday Ticket by using multiple network signals with a compulsory license subsidy. The NHL shares the concern, although to a different degree.

For example, in the last four weeks of the NHL regular season schedule, the League will regionalize four telecasts each week on ABC. A satellite carrier, offering local-into-local service, would have access to all four games and could create a multi-game hockey package, by paying only the (highly subsidized) compulsory license fee. This kind of offering would create unfair competition not only to the ABC package, but to the League's Center Ice program.

The Commission should recognize the "unitary" nature of the sale to ABC and treat these multiple hockey telecasts as it would multiple transmissions of, for example, "The Practice." The Commission should further allow local ABC affiliates to exercise network nonduplication protection against the importation of other games, which are part of the same hockey package.

- (r) Should a nationally distributed superstation which is also a network station be treated as a superstation in its own market -- which might subject it to being blacked out on satellite even in its local market -- or should it be considered a local station?⁵⁷

The analogy made in Para. 34 to the must carry rules is apt. Notwithstanding that they now may be received by local satellite customers off the satellite, local-into-local-satellite-delivered stations still should be treated as local stations in their own markets.

- (s) Since a nationally distributed superstation can also be a network station (five of the six are WB or UPN affiliates), should they be treated as nationally distributed superstations or network stations for purposes of sports blackout?⁵⁸

⁵⁷ Para. 34.

⁵⁸ Para. 35.

As the Commission notes, this will come into play only if different regulations are adopted for nationally distributed superstations and network stations. However, from a statutory interpretation standpoint, since the five stations have been specifically identified and treated in Section 339(b)(1)(A), they must be accorded the protection noted in that section, i.e., comparable to existing Section 76.67, without being subject to the showing considered in (b)(1)(B).

- (t) Did Congress intend to extend these rules to digital broadcast signals or was it concerned only with analog signals?⁵⁹

As the Commission recognizes, Congress did not mention digital broadcasting in this context, while it did in dealing with alternative standards for eligibility to receive distant signals in Section 339(c).⁶⁰

Nevertheless, the focus of the Commission for the last twenty-five years, in the cable sports blackout rule, and Congress, in applying Section 339(b), was on the economic impact to sports. That will not change in a digital environment (as contrasted to the impact on the broadcast industry, which well could change). Therefore, without regard to the applicability of the program exclusivity rules to broadcast stations, the Commission should apply the sports blackout rule universally.

- (u) One provision of Section 76.67, describing television stations that trigger the rule, is obviously in error, since it references another section of the rules that no longer exists. How should the standard be reinstated?⁶¹

⁵⁹ Para. 36.

⁶⁰ See Notice at Footnote 80.

⁶¹ Para. 37 and Appendix C.

This technical problem in the rules arose as a result of rule changes going back 14 years and the Commission's failure to make conforming changes in subsequent versions of the regulations. It developed as a result of a successful challenge to the must-carry rules.⁶²

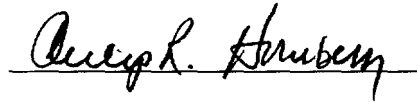
The blackout rule ought to be triggered by an absence of the particular game telecast from must-carry stations within that specific market, not within the particular DMA involved.

CONCLUSION

For the reasons stated above, the National Hockey League urges adoption of regulations consistent with the positions taken.

Respectfully Submitted,

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⁶² A challenge subsequently was raised to interim must carry rules which the Commission had used to determine the geographic area of sports blackout. See Report and Order in MM Docket No. 85-349, 61 RR2d 792 (1986), Reconsideration of Report and Order in MM Docket No. 85, 349, 62 RR2d 1251 (1987). Subsequently in late 1987, the Commission changed Section 76.67 to use rate regulation criteria as a substitute for what had been the must carry complement. But on May 3, 1993, when the Commission rolled back rate regulation, Report and Order in MM Docket No. 92-266, it eliminated Section 76.5(gg)—but overlooked that it had been referenced in Section 76.67.